Opinion No. 63-11
R-77
February 4, 1963

REQUESTED BY: BEN E. STANTON, Chief Right of Way Agent
Highway Department

OPINION BY: ROBERT W. PICKRELL
The Attorney General

QUESTIONS: 1. Where the Highway Commission determines that the public convenience and necessity requires the acquisition of right of way which traverses land already being devoted to a public use by a city, county, or other political subdivision of the State, must "just compensation" under the Constitution and laws of the State of Arizona, be paid.

2. If the answer to question number one is in the negative, by what means of conveyance or conveyances, is title to be vested in the State.

3. If your opinion differentiates between land held in a governmental capacity as against those held in a proprietary capacity, we would appreciate ary guide lines you can furnish to assist us in determining the category under which various types might fall.

ANSWERS: See body of opinion.

It should be stated at the outset that while the general rules relating to the answers above propounded are generally concurred in by the courts, their application to a particular fact situation from jurisdiction to jurisdiction, vary widely.

As a general rule, property devoted to one public use may be taken for another public use by another or by the same public body where the new proposed use is a higher public use and will serve a greater public interest. 1 Nichols on Eminent Domain, Sec. 2.2(6), p.150; 18 Am. Jur., Eminent Domain, Sections 82, 83; 29 C.J.S., Eminent Domain, Section 86. This rule has been characterized in this state by the following legislation, to wit, A.R.S. § 12-1112:

"Before property may be taken, it shall appear that

* * *

3. If the property is already appropriated to some public use, the public use to which it is to be applied is a more necessary public use."

Moreover, although generally takings for highway purposes have been held to constitute "more necessary public uses," (1 Nichols on Eminent Domain, Sections 2.2 through 2.21(4)), the courts in some jurisdictions have required that proposed highway alignments be altered so that the existing public use would not be completed or materially destroyed. In other words, some courts have taken the view that the inferior public use should be saved where a slight change in highway alignment can accomplish this purpose. 18 Am. Jur., Eminent Domain, Section 98.

There is nowhere contained in the Arizona statutes a provision with respect to whether, when public property is taken for a more necessary public use, just compensation must be paid by the acquiring agency. There is, however, one Arizona case which sheds some light upon the subject. In City of Mesa v. Salt River Project Agr. Imp. & P. Dist., 92 Ariz. 91, 373 P.2d 722, the court quoted the applicable provisions of A.R.S. § 18-1112 and stated that (1) the Project in the operation of its electrical distribution system is functioning in a proprietary as distinguished from governmental capacity, and that (2) therefore, Art. 2, Sec. 17 of the Constitution of Arizona required that if the City of Mesa was to take or damage any of the Project's facilities, just compensation must be paid. From the Court's analysis in the foregoing opinion, it can be concluded that our courts will follow to the general rule, to wit: That where publicly owned land is taken for a higher public purpose just compensation must be paid where such land is being held in a proprietary capacity and that no compensation should be paid where the land is held in a governmental capacity.

The above distinction between governmental and proprietary capacities of governmental agencies rests upon a general judicial recognition that certain of the functions of local government are governmental in character while others, the benefit of which inure more the local inhabitants, are proprietary.

"In the one character, municipalities are mere

agencies of the state, or rather units into which it has divided itself in order that the business of government may be more conveniently handled, and in this character they execute the functions and possess the attributes of sovereignty which have been delegated to them by the legislature. . . . In their other or private character they are mere aggregations of individuals living in the same neighborhood who have banded together in order to supply themselves with the necessities and conveniences of life which co-operation will enable them to obtain more readily and cheaply than by individual effort. In this character they are clothed with the capacities of a private corporation, and may claim its rights and immunities and are subject to its liabilities. . . . Over the property which a municipal corporation acquires as an agency of the state for the performance of strictly public duties devolved upon it by law, the legislature may exercise a control to the extent of requiring the municipal corporation, without accruing compensation therefor, to transfer such property to some other agency of the government to be devoted to similar public use, or to other strictly public purpose. . . . The property acquired by municipal corporations for the private benefits of their inhabitants is protected by the constitution and can be taken only by eminent domain and upon payment of just compensation." (1 Nichols on Eminent Domain, Sec. 2.225).

See also 2 Nichols on Eminent Domain Sec. 5.9; 29 C.J.S. Eminent Domain, Sec. 130; 18 Am.Jur. Eminent Domain, Sec. 170; 56 A.L.R. 365; Orgel on Valuation under Eminent Domain, Vol. 1, Sec. 42.

Having set forth the general rule the following caveat as stated in 1 Nichols on Eminent Domain Sec. 2.225(2) p.180, must be called to your attention:

"The rule itself is clear enough, and the distinction which it draws is often plain; but many municipal functions fall so close to the line that

very perplexing questions arise in deciding upon which side to place them. The difficulty is increased by the fact that property devoted to the same use may be held under different laws in one state from those under which it was acquired in another, and may be subject to different duties and obligations, so that property of the same kind might be held strictly for public uses in one state, while in another it might not be. Moreover, although the two-fold character of municipal corporations is recognized in branches of the law other than that now under consideration, notably that relating to their liability for tort, and in general the same distinction is made between the two characters of such bodies, the exact line drawn is sometimes very different, so that the same undertaking may be held in the same state governmental for some purposes and private for others." (Emphasis added).

There are, however, a great many areas in which the courts are in such wide agreement concerning the governmental or proprietary nature of a function that the ruling of our courts can be anticipated with a reasonable degree of certainty. Property owned for the following functions are held governmental: streets, highways and police property. Property devoted to water works, gas or electric lighting plants, cemeteries, markets, hospitals, libraries and ferries are generally held to be owned by local governments in their proprietary capacities. Typical of the functions which lie within the "gray area" are parks, schools, fire departments and municipal airports.

In only two instances, within the general framework of the power of eminent domain, has our Supreme Court been called upon to determine whether property held by a local government was being held in a governmental or proprietary capacity. In City of Scottsdale v. Municipal Court of Tempe, (1962) 90 Ariz. 393, 368 P.2d 673, it was determined that the operation of a sewage disposal plant is a governmental function. In City of Mesa v. Salt River Project Agr. Imp. & P. Dist., (1962) 92 Ariz. 91, 373 P.2d 722, the court decided that property held for the purpose of providing electrical energy is held by a municipal corporation in its proprietary capacity.

It should be noted that with respect to property held for

school purposes, there have recently been three cases from other jurisdictions, holding that when such property is taken for higher public purposes, just compensation must be paid. School Dist. of Borough of Speers v. Commonwealth, (Pa.) 117 A. 2d 702; County School Board v. School Board, etc., (Va.) 91 S.E. 2d 654; State v. Salt Lake City Public Board of Education, (1962) 13 Utah 2d 56, 368 P.2d 468.

In the last cited case, the State Road Commission, in connection with the construction of a new freeway through Salt Lake City (Interstate Highway 15), found it necessary to condemn the Franklin School, belonging to the Salt Lake City Board of Education. Possession was taken by stipulation and the question of compensation was reserved for trial. Counsel for the road commission argued that, irasmuch as the property was merely being transferred from one public use and one public agency to another, it was not obliged to pay for the taking of school property. The court stated that the critical inquiry was whether the legislature intended that a school board's property should be taken for highway purposes without being paid for it. The court noted that the Utah statutory provision (like A.R.S. § 18-1112) did not state specifically whether compensation was to be paid to a public agency from which property was taken. However, without making any distinction between the method of taking public or private property, the statute required any condemner, without any exception, to take all of the essential steps to condemnation. It required that "all owners" of property taken be named as defendants in the complaint; that the "value of the property sought to be condemned" be "separately assessed;" and that the taker pay the sum of money so assessed "within thirty days."

The court further stated that, if there was any uncertainty as to the meaning and the proper application of a statute, it was proper to look both to the purpose for which it was created and to the practical aspects of its operation in order to assist in determining the legislative intent. If an individual State agency such as the road commission, the court declared, could reach over and take a property such as the Franklin School, worth several hundred thousand dollars, from a single school board, that would disrupt the balanced plan for the financing of schools. And, as a practical matter, it would create insuperable obstacles for school boards in managing their schools.

The court saw nothing either in the express words of the statute or in the nature or purpose which suggested that the legislature intended any such result.

As can be seen from the foregoing discussion, no definitive test can be set forth which will give guidance in all cases, especially those areas which admittedly lie within the "gray zone." It will therefore be necessary to examine each of such cases in light of its particular fact situation before a legal determination can be made. And in the final analysis it may be that the courts of this state will have to make these determinations.

With respect to the means of conveyance through which the highway department is authorized to take title to property owned by another public body, A.R.S. § 12-1112 in authorizing condemnation of such property, establishes this means by necessary implication. And it is axiomatic that what a state may accomplish by condemnation and final order, it may also accomplish through deeds, easements or any lesser conveyance.

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